

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: August 10, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Everfresh Beverages Inc.
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Serial No. 88900190
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George D. Dickos and Anna Shabalov of K&L Gates LLP,
for Everfresh Beverages Inc.

Oreoluwa Alao, Trademark Examining Attorney, Law Office 108,
Kathryn E. Coward, Managing Attorney.

—
Before Zervas, Goodman and Lebow,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Everfresh Beverages Inc., seeks registration on the Principle Register of the standard character mark LA CROIX GUAVA SAO PAULO (“GUAVA” disclaimed) for “sparkling water” in International Class 32. The application includes the following translation statement: “The English translation of LA CROIX in the mark is THE CROSS.”¹

¹ Application Serial No. 88900190 (“the Application”) was filed on May 4, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intent to use the mark in commerce.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the standard-character mark SAO PAULO STRAWBERRY LEMON (“STRAWBERRY LEMON” disclaimed), registered on the Principal Register for “non-alcoholic beverages containing fruit juices; fruit flavored beverages; fruit-flavored drinks; fruit based beverages; fruit based beverages enhanced with antioxidants; [and] fruit flavored beverages enhanced with antioxidants,” in International Class 32,² as to be likely, when used in connection with the goods identified in the Application, to cause confusion or mistake, or to deceive.

After the refusal was made final, Applicant appealed and requested reconsideration, which the Examining Attorney denied. The appeal has been briefed.

We affirm the refusal.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. Applicant attached new evidence to its appeal brief consisting of numerous trademark registrations owned by Applicant, Registrant, and various third parties,³ which Applicant references in its brief.⁴ “Because applicant’s new evidence was

Page references to the application record are to the downloadable .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board’s TTABVUE docket system.

² Registration No. 5257289 (“the Registration”) issued on August 1, 2017 in the name of BAI Brands, LLC (“Registrant”).

³ 6 TTABVUE 16-68 (Applicant’s Brief, Exhibits A-C).

⁴ *Id.* at 2-3, 10-11.

untimely submitted during an appeal, the trademark examining attorney objects to this evidence and requests that the Board disregard it.”⁵

We sustain the Examining Attorney’s objection. “The evidence submitted with Applicant’s appeal brief that Applicant did not previously submit during prosecution (including the request for reconsideration) is untimely and will not be considered.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018) (citing Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d)), *aff’d*, 777 Fed. App’x 516 (Fed. Cir. 2019)). We also give no consideration to argument relating to that untimely evidence.

II. Likelihood of Confusion

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” Our determination of the likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Varying weights may be assigned to each *DuPont* factor depending on the evidence

⁵ 8 TTABVue 10 (Examining Attorney’s Brief).

presented in a particular case. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). “In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at *29 (TTAB 2021) (citing *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)).

A. Similarity or Dissimilarity of the Goods and Trade Channels

The second *DuPont* factor “considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’ ... the third *DuPont* factor considers ‘the similarity or dissimilarity of established, likely-to-continue trade channels,’” *In re Embiid*, 2021 USPQ2d 577, at *29 (TTAB 2021) (quoting *In re Detroit Athl. Co.*, 903 F.3d 1297, 128 USPQ2d, 1047, 1051-52 (Fed. Cir. 2018) (internal quotation omitted)), and the fourth *DuPont* factor “considers “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse vs. careful, sophisticated purchasing.’” *Id.* (quoting *DuPont*, 177 USPQ at 567).

The Application’s broad identification of “sparkling waters” encompasses all sparkling waters, including those that are fruit-flavored, fruit-based, and/or enhanced with antioxidants. Sparkling waters with these ingredients are encompassed within the Registration’s broad identification of “non-alcoholic

beverages containing fruit juices; fruit flavored beverages; fruit-flavored drinks; fruit based beverages; fruit based beverages enhanced with antioxidants; [and] fruit flavored beverages enhanced with antioxidants”. *See, e.g., In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018) (where a description of goods includes no restrictions or limitations, the Board must read the application to cover all goods of the type identified); *Sw. Mgmt., Inc. v. Ocinoled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (where the services in an application or registration are broadly described, they are deemed to encompass all the activities of the nature and type described therein), quoted in *In re Country Oven, Inc.*, 2019 USPQ2d 443903, * 4 (TTAB 2019) and cited in *In re AC Webconnecting Holding B.V.*, 2020 USPQ2d 11048, *11-12 (TTAB 2020). Applicant’s and Registrant’s goods are legally identical.

In addition to relying on the facial identity of the respective goods, the Examining provided an assortment of Internet evidence showing that various beverage companies including Sparkling Ice, Pepsico, Spindrifit, Waterloo, Aha, Hint, Perrier, Poland Spring, and Schweppes offer “sparkling waters as fruit flavored beverages.”⁶ For example, Sparkling Ice offers “Fizzy, Fruity, Sparkling Water” with flavors of grape raspberry, black cherry, black raspberry, pomegranate blueberry, fruit punch, and cherry limeade.⁷ Pepsico, under its “Bubly” brand, “pairs crisp, sparkling water with natural fruit flavors” and is “[a]vailable in 15 flavors.”⁸ And Spindrifit offers

⁶ *Id.* at 12-13; August 5, 2020 Office Action, TSDR pp. 10-20; March 4, 2021 Final Office Action, TSDR pp. 22-31.

⁷ August 5, 2020 Office Action, TSDR pp. 15-16.

⁸ *Id.* at 17.

“America’s first sparkling water made with just real squeezed fruit” in 11 different flavors.⁹

Moreover, “[f]or purposes of this appeal, [Applicant] does not contest the Examining Attorney’s determination that the goods covered by the Applied-for Mark and Cited Mark are ‘commercially related.’”¹⁰

Finally, because the goods in the Application and Registration are overlapping and thus legally identical, we must presume that the trade channels and classes of consumers for those overlapping goods are also identical. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018); *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *see also Inter IKEA Sys. B.V. v. Akea*, 110 USPQ2d 1734, 1743 (TTAB 2014); *L. & J.G. Stickley, Inc. v. Cosser*, 81 USPQ2d 1956, 1971 (TTAB 2007) (“Because the goods of both parties are at least overlapping, we must presume that the purchasers and channels of trade would at least overlap.”). The consumers of Applicant’s and Registrant’s goods are members of the general public.

The second and third *DuPont* factors weigh strongly in favor of finding a likelihood of confusion.

⁹ *Id.* at 19-20.

¹⁰ 6 TTABVUE 5 n. 1 (Applicant’s Brief).

B. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *Embiid*, 2021 USPQ2d 577, at *11 (TTAB 2021) (quoting *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *Inn at St. John’s*, 126 USPQ2d at 1746 (quoting *In re Davia*, 110 USPQ2d 1801, 1812 (TTAB 2014)).

“The proper test regarding similarity ‘is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.’” *Id.* (quoting *Cai v. Diamond Hong*, 127 USPQ2d at 1801 (internal quotation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than a specific impression of marks.” *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)).

Applicant’s proposed mark is LA CROIX GUAVA SAO PAULO and Registrant’s mark is SAO PAULO STRAWBERRY LEMON.

The Examining Attorney contends that the marks are “confusingly similar in appearance” because “the common distinctive wording in the compared marks, SAO PAULO, creates a highly similar commercial impression.”¹¹ “When geographic terms

¹¹ 8 TTABVUE 5 (Examining Attorney’s Brief).

are used in marks,” she explains, “the geographic terms commonly are disclaimed if they are descriptive of the origin of applicant’s goods or services, and they are not treated as indicators of source.”¹² And “when a geographic name in a mark is not likely to be perceived as identifying the geographic origin of the goods or services, the geographic name is regarded as arbitrary, fanciful, or suggestive, and entitled to protection against the similar mark of a subsequent user for the same or related goods. *See* TMEP [TRADEMARK MANUAL OF EXAMINING PROCEDURE] §1210.02(c)(iii).”¹³

The Examining Attorney maintains that “[t]he additional terms LA CROIX and GUAVA in the applied-for mark, and STRAWBERRY LEMON in the registered mark, do not diminish the confusing similarity in appearance between the compared marks.”¹⁴ She highlights disclaimer of the terms STRAWBERRY LEMON in Registrant’s mark, and GUAVA in Applicant’s mark, arguing those terms “will be perceived by prospective purchasers in their respective descriptive contexts as flavors, rather than as indicators of source” and thus are “are less dominant when comparing the marks and do not diminish the confusing similarity between them.”¹⁵

The Examining Attorney further asserts that:

- “[A]pplicant owns multiple registrations of the mark for the same and related goods, which include the wording ‘LA CROIX’, specifically, Reg. Nos. 5506123, 5710857, 5710858, 5835493 and 5835495. *See* March 4, 2021 Office Action, TSDR pp. 1, 2-16”;
- “Applicant subsequently affirmed that the applied-for mark begins with

¹² *Id.* at 10.

¹³ *Id.*

¹⁴ 8 TTABVUE 5 (Examining Attorney’s Brief).

¹⁵ *Id.* at 7.

its famous LA CROIX component. *See* September 2, 2021 Request for Reconsideration Action, TSDR p. 1”; and

- “by applicant’s own admission, LA CROIX is a well-known house mark, which would be recognizable to ordinary buyers. *See* December 6, 2021 Appeal Brief, TSDR p. 8.”¹⁶

Nonetheless, she maintains that “the addition of LA CROIX to the applied-for mark does not obviate the likelihood of confusion between the marks.”¹⁷ She elaborates:

During prosecution, the trademark examining attorney noted that applicant owns multiple registrations of marks for the same and related goods as those in the instant application, which include the wording “LA CROIX”, specifically, Reg. Nos. 5506123, 5710857, 5710858, 5835493 and 5835495. *See* March 4, 2021 Office Action, TSDR pp. 1, 2-16. Applicant subsequently affirmed that the applied-for mark begins with its famous LA CROIX component. *See* September 2, 2021 Request for Reconsideration Action, TSDR p. 1. In fact, by applicant’s own admission, LA CROIX is a well-known house mark, which would be recognizable to ordinary buyers. *See* December 6, 2021 Appeal Brief, TSDR p. 8.

By their nature, house marks identify the provider of a wide variety of goods or services, with such goods or services often themselves identified by a separate trademark or service mark. Thus, marks attributed to the same source will not always have the house mark appearing with it. Importantly, this Board has held that adding a house mark to an otherwise confusingly similar mark will not obviate a likelihood of confusion under Section 2(d). ...

... Applicant merely has taken LA CROIX, a famous house mark, recognizable to the ordinary buyer, and added it with a descriptive flavor to the mark SAO PAULO, giving rise to the likelihood of confusion analysis. ...

Moreover, consumers are used to seeing marks originating from the same source appearing with the source house mark included at times, while omitted at others times. Indeed, goods may bear both a trademark and a house mark. It stands to reason then, when a house mark is omitted from a trademark, the resulting mark is likely to appear to

¹⁶ *Id.*

¹⁷ *Id.* at 7.

prospective purchasers as a shortened form of the initial mark. Thus, the omission of a house mark from a mark may not overcome a likelihood of confusion.¹⁸

The Examining Attorney concludes:

[U]pon encountering the marks LA CROIX GUAVA SAO PAULO and SAO PAULO STRAWBERRY LEMON in use with the highly related goods of applicant and registrant, the average purchaser likely will attribute the marks to the same source. Being familiar with applicant's famous house mark, the average purchaser likely would recognize LA CROIX as the provider of the goods, SAO PAULO as the trademark and GUAVA and STRAWBERRY LEMON as flavors. Importantly, the commercial impression of the wording SAO PAULO remains unchanged by the addition of the house mark and flavors in the respective marks. Consequently, SAO PAULO STRAWBERRY LEMON in the registered mark likely will appear as a shortened form of the applied-for mark, merely having a different flavor¹⁹

Applicant rejects this conclusion, asserting that while “[t]he Examining Attorney correctly recognized that the ‘LA CROIX’ element of the Applied-for Mark would be viewed by consumers ‘as applicant’s house mark,’” August 5, 2020 Office Action, TSDR p. 3, “the Examining Attorney dismissed the importance of the House Mark by erroneously declaring a *per se* rule—that ‘adding a house mark to an otherwise confusingly similar mark will not obviate a likelihood of confusion.’”²⁰ Applicant points out that the three cases cited by the Examining Attorney relating to inclusion of a house mark – *In re Fiesta Palms LLC*, 85 USPQ2d 1360 (TTAB 2007) (CLUB PALMS MVP versus MVP), *In re Christian Dior, S.A.*, 225 USPQ 533 (TTAB 1985) (LE CACHET DE DIOR versus CACHET), and *In re Chica, Inc.*, 84 USPQ2d 1845

¹⁸ *Id.* at 7-9 (citations omitted).

¹⁹ *Id.* at 9.

²⁰ 6 TTABVUE 5 (Applicant’s Brief).

(TTAB 2007) (CORAZON BY CHICA versus CORAZON) – “all found a likelihood of confusion based on a specific circumstance not present here, namely, where the entirety of the cited registration was subsumed in applicant’s mark.”²¹

We agree with Applicant that “there is no arbitrary rule of law that if two product marks are confusingly similar, likelihood of confusion is not removed by use of a company or housemark in association with the product mark.” *New Eng. Fish Co. v. Herwin Co.*, 511 F.2d 562, 184 USPQ 817, 819 (CCPA 1975). We are also not aware of any per se rule that one’s entire mark must be subsumed by another before finding a likelihood of confusion exists when a house mark is added. *See e.g., Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1266, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (finding that, even though applicant’s mark PACKARD TECHNOLOGIES (with “TECHNOLOGIES” disclaimed) did not incorporate every feature of opposer’s HEWLETT PACKARD marks, a similar overall commercial impression was created). “Rather, each case requires a consideration of the effect of the entire mark including any term in addition to that which closely resembles the ... [cited] mark.” *Id.* at 819 (BLUE MOUNTAIN KITTY O’s and KITTY, both marks for cat food, not similar).

Nevertheless, it has long been established that the addition of a house mark to a registered mark does not generally avoid confusion, and is sometimes even found to be an “aggravation and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor.” *Menendez v. Holt*, 128 U.S. 514, 521, 1889 Dec. Comm’r Pat. 344 (1888); *see also In re Fiesta*

²¹ 6 TTABVUE 6-7 (Applicant’s Brief).

Palms LLC, 85 USPQ2d at 1367 (affirming refusal to register CLUB PALMS MVP based on prior registration of MVP, finding consumers “likely to believe that the CLUB PALMS MVP casino services is simply the now identified source of the previously anonymous MVP casino services”); *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1201-02 (TTAB 2007) (applying principle that “the addition of a trade name or house mark or other such matter to one of two otherwise similar marks will not serve to avoid a likelihood of confusion”).

There are times, typically in cases involving “highly suggestive” shared terms, where adding a house mark to a registered mark is sufficient to avoid confusion. “This is so because the scope of protection afforded a highly suggestive term is somewhat less than that given an arbitrary or distinctive mark so that a subsequent user may come closer to a highly suggestive mark than to a strong mark without violating the rights of the owner of said mark.” *Melaro v. Pfizer, Inc.*, 214 USPQ 645, 648 (TTAB 1982) (SILK for cosmetics and toiletries versus SILKSTICK for cosmetics). “Thus, unlike in the case of an arbitrary or unique designation, the addition of other matter to a highly suggestive term may be sufficient to distinguish between them and to avoid confusion in trade.” *In re Sien Equip. Co.*, 189 USPQ 586 (TTAB 1975).

Applicant acknowledges this principal in its brief, noting that the Board in *In re Christian Dior*, 225 USPQ at 534, explained that “where there are some recognizable differences in the asserted conflicting product marks or the product marks in question are highly suggestive or merely descriptive or play upon commonly used or registered terms, the addition of a housemark and/or other material to the assertedly conflicting

product mark has been determined sufficient to render the marks as a whole sufficiently distinguishable.”²² *Id.* at 534. Applicant also highlights *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163 (TTAB 2011), where the Board noted that “the addition of the distinctive house mark ZIG ZAG to the highly suggestive phrase [CLASSIC AMERICAN BLEND] [was] sufficient ... to outweigh the similarities.”²³ *Id.* at 1175.

But Applicant has not provided any evidence in this case, nor has it argued, that the shared term, SAO PAULO, in the marks is suggestive, much less “highly suggestive,” of the identified goods. Rather, SAO PAULO appears to be arbitrary in both marks. Although São Paulo is the capital of the state of São Paulo and is Brazil’s most populous city,²⁴ there is no evidence that SAO PAULO has any geographic significance with regard to the goods in either mark.²⁵

While we must consider the marks in their entirety, “there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the

²² *Id.* at 6.

²³ *Id.* at 8-9.

²⁴ <https://www.merriam-webster.com/dictionary/Sao%20Paulo> (accessed on August 3, 2022), MERRIAM-WEBSTER DICTIONARY. “The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions.” *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013) (citations omitted).

²⁵ Applicant argues that “in the relevant field of sparkling water and fruit flavored beverages, tropical geographic designators and place names, like SAO PAULO, are frequently used and, as a result, consumers are conditioned to look to other distinguishing elements of marks.” 6 TTABVUE 11 (Applicant’s Brief). That argument, however, is based on untimely third-party registration evidence that we have given no consideration, and is therefore unsupported, and hence not persuasive.

marks in their entireties. Indeed, this type of analysis appears to be unavoidable.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985), quoted in *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014). Here, the GUAVA SAO PAULO portion of Applicant’s mark, and the entirety of Registrant’s mark, SAO PAULO STRAWBERRY LEMON, are highly similar, both identifying a fruit or a flavor of water with the term SAO PAULO. We accord the terms GUAVA and STRAWBERRY LEMON less weight in evaluating the marks because they merely describe features of the goods.

The fact that the merely descriptive wording precedes SAO PAUL in Applicant’s proposed mark, but follows SAO PAULO in Registrant’s mark, is not significant. Our focus is on the recollection of the average beverage purchaser, who normally retains a general rather than a specific impression of the marks. *Spoons Rests., Inc. v. Morrison, Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 161 USPQ 687, 688 (CCPA 1969) (many consumers “may have but dim recollections from having previously seen or heard one or the other of the involved marks.”).

Applicant concedes that SAO PAULO is the dominant element in Registrant’s mark “given it is the first element and the element that follows, STRAWBEERY LEMON has been disclaimed.”²⁶ But Applicant argues that “in the Applied-for Mark,

²⁶ *Id.* at 7. Applicant additionally asserts that “the Cited Mark appears in small font below the far more prominent BAI house mark owned by [Registrant],” pointing to an image embedded in its brief to support that assertion. *Id.* However, that image is not of record and we give it no consideration. Even if it were of record, it would not aid Applicant because our

the House Mark is the first dominant element. LA CROIX is a well-known house mark, such that ordinary buyers are much more likely to recognize it and consider it the dominant part of Applicant's Mark."²⁷ "Because the House Mark is a widely recognized mark on its own," Applicant concludes, "the overall appearance, sound, connotation, and commercial impression of the Applied-for Mark incorporating the House Mark is significantly different from the Cited Mark."²⁸

However, that is the precise reason adding a house mark to a registered mark "does not generally avoid confusion, and is sometimes even found to be an 'aggravation and not a justification....'", for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor." *Menendez v. Holt*, 128 U.S. at 521. We find that to be true in this case as well: the addition of Applicant's purportedly well-known house mark LA CROIX to otherwise confusingly similar marks serves to aggravate, rather than mitigate against, a likelihood of confusion.²⁹

analysis is based on the marks as depicted in the respective application and registration, without regard to whether the marks will appear with other marks, such as house marks, or other elements when used. *See Shell Oil*, 26 USPQ2d at 1690 n.4 (indicating that applicant's assertions that the applied-for mark would appear with applicant's house mark were not considered in the likelihood-of-confusion determination); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) ("[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application. We must compare the marks as they appear in the drawings, and not on any labels that may have additional wording or information.").

²⁷ *Id.* at 7-8.

²⁸ *Id.* at 8.

²⁹ While we often consider the first term in a mark to be the feature that will be called for, and so remembered, by consumers, this is not invariably the case. *See Stone Lion*, 110 USPQ2d at 1161 ("[T]he Board did not err in finding that 'STONE LION CAPITAL' is 'similar in sight, sound, meaning, and overall commercial impression' to 'LION CAPITAL' and 'LION.'"); *Chatam Int'l*, 71 USPQ2d at 1946 ("Viewed in their entirety with non-dominant

Were we to find otherwise, allowing registration of the LA CROIX GUAVA SAO PAULO mark over Registrant's SAO PAULO STRABERRY LEMON mark for overlapping goods, we would be encouraging a circumstance of reverse confusion – “the situation where a significantly larger or more prominent newcomer ‘saturates the market’ with a trademark that is confusingly similar to that of a smaller, senior registrant for related goods or services.” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *17 (TTAB 2021) (citing *Shell Oil*, 26 USPQ2d at 1690).

For the foregoing reasons, and bearing in mind that “the more similar the goods at issue, the less similar the marks need to be for the Board to find a likelihood of confusion,” *In re Hitachi High-Technologies Corp.*, 109 USPQ2d 1769, 1773 (TTAB 2014), which here are legally identical, we find that Applicant's proposed mark LA CROIX GUAVA SAO PAULO and Registrant's SAO PAULO STRAWBERRY LEMON are more similar than dissimilar. The first *DuPont* factor therefore weighs in favor of finding a likelihood of confusion.³⁰

features appropriately discounted, the marks [GASPAR'S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical.”).

³⁰ For reasons already expressed herein, we are not persuaded by Applicant's remaining argument that the respective marks “differ substantially in sight and sound” because “[t]he Applied-for Mark has five words and seven syllables while the Cited Mark has four words and eight syllables”; “[t]he Applied-for Mark has three words entirely missing from the Cited Mark (LA CROIX and GUAVA), while the Cited Mark has two words entirely missing from the Applied-for Mark (STRAWBERRY LEMON)”; “[t]he Applied-for Mark opens with the two word LA CROIX element followed by the subsidiary SAO PAULO and GUAVA elements,” whereas “the Cited Mark opens with the SAO PAULO element, which is followed by the subsidiary STRAWBERRY LEMON element”; and “the Cited Mark has a strong element of alliteration resulting from its first and third words beginning with the ‘S’ letter and sound.” 6 TTABVUE 9-10 (Applicant's Brief) (emphasis omitted).

III. Conclusion

As discussed above, the identifications of goods overlap and we presume that the trade channels and classes of purchasers are identical. The marks are also similar, particularly in view of our finding that Applicant's inclusion of its house mark LA CROIX to its proposed mark aggravates, rather than mitigates against, a likelihood of confusion. We thus find that there is a likelihood of confusion between Applicant's proposed mark LA CROIX GUAVA SAO PAULO and Registrant's SAO PAULO STRAWBERRY LEMON mark for the identified goods.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.